IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 358/2001
(Old No. 3079/1986)

Gwanu … Appellant.

Vs.

State .. Respondent.

Decided on 30-08-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(B.S. Verma, J.)

Dated: 30-08-2005.

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 358/2001
(Old No. 3079/1986)

Gwanu S/o Amaru
R/o Village Nair, Patti Bhendarsue
P.S. Dharasu, District Uttarkashi ..Appellant.

Vs.

State .... Respondent.

Sri Rajendra Kotiyal, learned counsel for the accused.
Sri H.C. Pande, learned A.G.A. assisted by Sri M.A. Khan, learned Brief Holder for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Dated: 30-08-2005

(P.C.)

Accused Gwanu has preferred this appeal from his conviction and sentence to imprisonment for life under Section 302 I.P.C. per judgment dated 10-10-1986 passed by the then Sessions Judge, Uttarkashi, in Sessions Trial No. 7/1986,

2- Briefly stated the prosecution case as emerged from the F.I.R and the evidence of the prosecution is as under:

Smt. Fajiti (P.W.2) was resident of District Tehri Garhwal but had shifted to village Nair-Hareti P.S. Darasu, Tehsil Dunda, Uttarkashi about five or six years before the incident in question and was residing in the house of her brother-in-law (Devar) Suratu along with her children. The cause of her shifting was strained relations with the husband. Smt. Vimala the daughter of Smt. Fajiti was married about five years ago and since her husband had shifted to Bombay after getting married second time she also started residing with her mother. Smt. Fajiti's son Kamalu was also residing with her. The accused a distant relative of Smt. Fajiti, is resident of village Nair. On 24.6.1986 at about 7 or 8 A.M. Smt. Vimala was inside the room whereas her mother Smt. Fajiti was in the Varandah of the said room of the house along with her son Kamalu and Smt. Banchhi and Smt. Bachanu, the two wives of Saratu. At that time accused Gwanu came in their house and straightway went in the room where Smt.

Vimala was sleeping. When Smt. Fajiti inquired from Gwanu as to why he was going inside the room he told her that he want to talk to Smt. Vimala. Accused Gwanu entered inside the room and it was then seen by Smt. Fajiti that accused started beating Smt. Vimala with a stick and when Smt. Fajiti intervened she was pushed off by the accused. He then picked up a club (Danda) and gave its blow on the neck of Smt. Vimala and also twisted her neck. The accused then fled away from there.

3- Hearing the alarm and noise, informant Sinkya (P.W.1) the son-in-law of Smt. Fajiti also residing in that vicinity reached there. Considering the injuries sustained by Smt. Vimala a pharmacist was summoned from Kalyani who injected some medicine and tried to administer glucose but Smt. Vimala could not be saved and she breathed her last due to the injuries. The information was then carried to the village Pradhan where after P.W.1, went with him to report the matter to the police. P.W.1 is reported to have lodged the oral first information report, Ext. Ka.2 at P.S. Dharasu the same day at 8-10 P.M. and on its basis case under Section 304 I.P.C. was registered against the accused. The investigation was taken up by Station Officer S.I. B.S. Yadav (P.W.5) who left for the village of the occurrence and reached there in the night. However due to darkness the inquest on the dead body of Smt. Vimala was held on 25-6-1986 and inquest report, Ext. Ka.4 was then prepared together with other relevant documents. He packed and sealed the dead body and sent it for post mortem examination which was conducted by Dr. S.S. Aswal (P.W.4) on 25-6-1986 at 3 P.M. Other formalities of the investigation were completed and finally charge sheet, Ext. Ka.9 was submitted against the accused on 11-7-1986.

4- The accused was committed to court of Sessions and he was charged under Section 302 I.P.C. on 16-8-1986. He pleaded not guilty and claimed to be tried.

5- The prosecution, to bring home guilt to accused relied upon the evidence of five witnesses. P.W.1, Sinkya is the informant who lodged the oral report at the Police Station, Dharsu. P.W.2, Smt. Fajiti and her son P.W.3, Kamalu, aged about 16 years, are the two eye witnesses of the incident and they supported the prosecution

version by narrating what has been mentioned above with regard to the case of the prosecution. P.W.4, Dr. Suraj Singh Aswal conducted the post mortem examination on the dead body of Smt. Vimala and prepared the post mortem examination report, Ext. Ka.1. P.W.5, S.O. Bharat Singh Yadav in the investigating officer of the case. He proved F.I.R. written by Head Moharir Jot Singh and corresponding G.D. entry No. 26, dated 26.6.1986, Ext. Ka.2 and Ext. Ka.3 respectively. The inquest report prepared by him was referred above. He also seized a stick and a club (Danda), exhibits 1 and 2, from the house of the victim vide memo, Ext. Ka.8.

6- No evidence was adduced in defence. The accused in his statement under Section 313 of the Code of Criminal Procedure gave out that Smt. Fajiti and Smt. Vimala deceased lived in his house for some time and since both the ladies were of easy virtues they were made to leave the house. He also stated that Smt. Fajiti and Sinkya used to abuse him on account if his cattle trespassing in their field. According to him he was falsely implicated, in the case due to enmity, by these witnesses.

7- It need to be stated that P.W.4, Dr. S.S. Aswal, proved that following ante-mortem injuries were found on the dead body of Smt. Vimala:-

1- Contusion on scalp at back, 15 c.ms, from hairline of forehead at the junction of parietal and occipital region, measuring 4.0 x 2.5cm in size. On cut clotted blood was present.

2- Abraded contusion on anterior aspect of left elbow measuring 3.0 x 2.0 cm in size. On cut clotted blood was present.

On internal examination clotted blood found under scalp at the level on injury No.1 and there was depressed fracture of occipital bone at the junction of both the parietal bone. Brain membranes were torn at the site of fracture of occipital bone. There was haematoma present in extra-dural area as well as there was sub-dural haemorrhage. Colour of haemorrhage was dark-brown. Left side of heart was empty and right side was partially filled with dark blood. Stomach was empty whereas there was semi-digested food and

gases in small intestine and gases and faecal matter in the large intestine.

In the opinion of the Medical Officer death was caused due to cardio-respiratory failure as a result of head injury by blunt object about a day ago. It may be recalled that the post mortem was conducted at 3 P.M. on 25-6-1986 and rigor mortis was found present in the body.

8- It is not dispute and as was also established by the medical evidence that the death of Smt. Vimala was homicidal. The trial court on an appreciation of the evidence of the prosecution drew an inference that the evidence of the two eye witnesses proved that the accused assaulted Smt. Vimala Devi at the time and place of the occurrence and that the conflict between the ocular and medical evidence was not as material as may have raised any doubt and suspicion in the claim of the prosecution and it was accordingly held that the evidence of the prosecution established beyond reasonable doubt that the accused fatally assaulted the victim Smt. Vimala. Accused was accordingly held guilty and convicted as aforesaid.

9- In support of the appeal learned counsel for the accused submitted that the evidence of the two eye witnesses of the case being shaky and discrepant failed to repose confidence and the trial court fell in error in accepting their evidence as trustworthy. He also submitted that the time of the occurrence as alleged by the prosecution was not established by the evidence and that there being total conflict between the ocular and medical evidence it was evidence that the witnesses have not seen the occurrence which probably took place some time in the dark hours of the night and when the crime was detected the accused was falsely roped in after due deliberations and consultations with the police and the informant of the case. Learned counsel therefore urged that the evidence of the prosecution should not have been relied upon and the accused should not have been held guilty and convicted for the offence with which he was charged.

10- As against this, the learned A.G.A. supported the judgment of the trial court and submitted that the judgment is well reasoned and no interference is called for. In this backdrop the evidence of the prosecution need to be re-appreciation and appraised to consider as to

whether the evidence of the prosecution was sufficient to prove beyond doubt that the offence was committed by the accused.

11- We have the evidence of two eye witnesses namely Smt. Fajiti (P.W.2) and her son Kamalu (P.W.3). They gave out that the incident took place at about 7 A.M. on the day of the occurrence. learned counsel of the accused disputed the claim of the prosecution and the evidence of these witnesses about the said time of the occurrence by referring to the medical evidence and other factors which shall be referred in relation to the evidence of these witnesses as to the manner of the actual assault allegedly made by the accused on the victim Smt. Vimala.

12- The positive case of the prosecution as set up by these eye witnesses was that accused came there in the house empty-handed and straightaway went inside the room where Smt. Vimala was sleeping. Accused then picked up a thin stick and gave out three or four blows of it on the person of Smt. Vimala and thereafter picked up a thick club (Danda) and gave its blow on the neck of the said victim. According to them accused also had the neck of the victim twisted and thereafter fled away from there. Both these witnesses seem to be very clear about the site of the blow, that is, neck of the victim given by a thick club and further that the neck of the victim was twisted by the accused. They were also certain that the victim was also assaulted by a then stick and three or four blows of the same were given on the person of the deceased by the accused. Both the witnesses however were very certain that not a single blow of the club or the thick stick was given on the back of the head of Smt. Vimala by the accused at that time. Contrary to the positive manner of assault and the seat of injury set up by these witnesses there was medical evidence to unerringly establish that no injury of any nature was found on the neck of the deceased and in all two injuries were found, one of which was a contusion on the scalp resulting in internal damage which caused the death of the deceased Smt. Vimala and which in fact was instantaneous due to cardio-respiratory failure. The two ante-mortem injuries have been referred above the referring to these learned A.G.A. submitted that when the witnesses say that the blow of the thick club was given on the neck, the witnesses probably intend to

convey that the seat of the blow was the back of the head and this was the reason that contusion on scalp at back at the junction of parietal and occipital region was the injury sustained by the victim. We do not think that both the witnesses wanted to convey that such an injury on the back of the head was sustained by saying that the blow of club was given on the neck. The witnesses not only speak of blow given on the neck but they also made it clear that the neck of Smt. Vimala was twisted by the accused after the blow of the club was given on the neck. The act of twisting of the neck attributed was also in reference to that part of the body and by no reasoning it could safely be accepted that these witnesses were referring to the injury of the head by saying that a blow of the club was given on the neck by the accused at the time of the incident.

13- This aspect of the matter may also be considered by another angle. The contusion on the scalp sustained was sufficiently big in size. It measured 4.0cm x 2.5cm and the junction of the parietal and occipital region lie right on the back of the head at a sufficient distance from the neck potion of the body and therefore there could not have been any confusion in the mind of both these witnesses to state about the seat of the injury if they have really witnessed the occurrence of actual assault. It is also the case of the prosecution that after the incident a pharmacist was summoned to give first aid to the victim and the pharmacist also tried to administer glucose to the victim after some injunction was already given but it could not be so done as Smt. Vimala had already breathed her last. If services of a pharmacist were taken then there could not have been any confusion about the seat of the injury and the witnesses would not have deposed in the manner as stated above and in the totality of the circumstances of the case and this glaring total conflict between the ocular and medical evidence the submission of the learned A.G.A. can hardly be said to be sustainable. From above it clearly appear to be a case which completely rule out the possibility of sustaining the fatal injury by the victim in the manner as alleged by the prosecution and as stated thereto by both the eye witnesses.

14- In other words it is not one of such cases in which there is minor variation with the medical evidence by reason of some

hypothetical answer of the medical witness but it is a case of total conflict between the eye witnesses account and the medical evidence and as a consequence thereof it would be difficult to believe that these eye witnesses were there to see the assault being made by the accused on Smt. Vimala. Both the eye witnesses and the informant Sinkya (P.W.1) gave out that Smt. Vimala survived for about two hours till the services of a pharmacist were obtained but considering the nature of the injury the claim of the witnesses fail to repose confidence and it could not be expected that Smt. Vimala remained alive for about two hours after the incident. It is in the medical evidence that the cause of death was cardio-respiratory failure due to head injury and this was, in all probability, a case of instantaneous death. It appear that in order to make it sure that the eye witnesses were able to witness the occurrence, such a manner of assault was projected and the time of the incident was also then shown to be about 7 A.M. when the occupants of the house normally woke up in the morning. It is in the evidence of the eye witnesses that by the time the occurrence took place Smt. Vimala has not come out of the room to begin her normal morning ritual and most probably she was then in her sleep. Smt. Fajiti (P.W.2) specifically stated that Smt. Vimala had taken her last meal in the preceding evening at about 6-7 P.M. and thereafter retried to her room. Learned counsel for the accused drew our attention to the medical evidence and submitted that the presence of semi-digested food and gases in the small intestine and presence of gases and faecal matter in the large intestine indicate that in all probability the victim Smt. Vimala met her death in the dark hourse of the night after about 6 or 7 hours of her taking the last meal and before she had eased herself. Dr. S.S. Aswal (P.W.4) also testified that presence of semi-digested food in the small intestine gave an indication that the deceased probably took her last meal some time about 4 to 10 hours before her death. When Smt. Vimala had taken her last meal at about 6 or 7 P.M. on 23-6-1986 and the death being instantaneous on account of the above fatal injury, the submission of the learned counsel for the accused can not safely be said to be without force and conviction and in other words there was strong probability that the occurrence took place few hours before 7 A.M. of

24.6.1986, that is, some time in the dark hours of the night when none was able to witness the assault made in Smt. Vimala and that too in a very short span of time and this resulted in bringing to surface the total conflict between the ocular and medical evidence. It appear that when the crime was detected in the morning the version was spun-out to show that the incident took place at about 7 A.M. and it was seen by the witnesses nominated in the F.I.R. and relied upon by the prosecution in the case. we find that the trial court has not considered these aspects of the matter in proper perspective and merely went by the evidence of eye witnesses to draw and inference that the accused assaulted Smt. Vimala Devi at the time and place as alleged by the prosecution and did not attach much importance to the glaring aspect of total conflict between the ocular and medical evidence of the case.

15. Learned counsel for the accused also pointed out that although informant Sinkya (P.W.1) was examined in the case but he was not made to prove the oral F.I.R. of the case lodged by him at the police station. It was also submitted that among the eye witnesses named in the F.I.R. name of witness Kamalu (P.W.3) was missing and that this aspect of the matter indicate that Kamalu was a got up witness. To support the submission attention was drawn to the fact that in the F.I.R. it was mentioned that the informant himself went to Kalyani to summon the pharmacist so that the medical aid may be given to the victim but in his evidence he gave out that Kamalu was sent by him to fetch the pharmacist and that this improvement was made in the evidence to justify the projection of Kamalu as one of the eye witness of the occurrence as being present in the house at the relevant time. Considering the fact that the evidence of eye witnesses has not been found to be trustworthy this submission of the learned counsel can not also be said to be without force and it could safely be accepted that there was an attempt to induct Kamlu as eye witness of the occurrence although he may be there in the house at that time and he was thus not mentioned as an eye witness in the F.I.R. In turn it can also be safely stated that the F.I.R. of the case could not have been taken by the trial court to fully corroborate the evidence of the eye witnesses.

16- Another peculiar feature of the case was that in the inquest report, Ext. Ka.4, while describing the injuries on the person of the

deceased Smt. Vimala, it was mentioned that contusions were present on the back, on the right and left flank of the abdomen and there was blackening all around the neck and none of these injuries or any signs of these got to be found by the autopsy surgeon and as submitted by the learned counsel for the accused it appear that these discrepancies crept in only on account of the fact that the occurrence was not witnessed by any one and after the crime was detected the accused was falsely roped in by assigning him the role of assailant.

17- Smt. Fajiti stated that the accused assaulted the victim on the pretest that the victim was maintaining illicit relations with the son of the accused. As submitted the motive alleged also does not appear to by convicting and the accused was not expected to have resorted to fatally assault the victim instead of reprimanding his own son and tell him to mend his ways. We are therefore convinced that the trial court was also not justified in drawing the inference that the accused has had strong motive to commit the crime.

18- Upon an independent evaluation of the evidence adduced by the prosecution and as discussed above we fail to find ourselves in agreement with the inference drawn by the trial court to form an opinion that the case of the prosecution gainst the accused stand proved beyond doubt. We are, therefore, of the firm view that the prosecution evidence do not repose confidence and the same not being credible and reliable the charge against the accused was not established beyond reasonable doubt and the accused was, in the peculiar circumstances of the case, entitled to be extended the benefit of doubt and to be acquitted of the charge levelled against him. The appeal therefore succeed and is to be allowed.

19- The appeal is allowed. The judgment dated 10-10-1986 convicting the accused under Section 302 I.P.C. and sentencing him to undergo imprisonment for life is set aside. The accused- appellant Gwanu is on bail. His bail bonds are cancelled and sureties are discharged.

20- Let the record be sent back to the trial court.

(B.S.Verma,J.) **(Irshad Hussain, J.)**

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